

IN THE CIRCUIT COURT OF OHIO COUNTY
WHEELING, WEST VIRGINIA

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4 IN RE:
5 TOBACCO LITIGATION CASE NO. 00-C-6000
6 MEDICAL MONITORING CASES

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9

10 JURY TRIAL

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12 Whereupon the above-entitled matter came on for
13 hearing before the Honorable Arthur M. Recht at the
14 Ohio County Courthouse, Wheeling, West Virginia, and
15 the proceedings are as follows.

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VOLUME 9-B

21

September 26, 2001

22

1:00 p.m.

23

24

	I N D E X	
		Page
1		
2	Witness	
3		
4	IRWIN W. TUCKER	
5	Designated	2289
6	Counterdesignated	2298
7		
8	EDWARD A. HORRIGAN, JR.	
9	Designated	2305
10	Counterdesignated	2307
11		
12	ROBERT SANFORD	
13	Designated	2311
14		
15		
16	Exhibits	Admitted
17	Plaintiff's 21648, 30960, 30958,	
18	15531, 38932, 38921, 35965, and 1038	2315
19		
20	37660, 20995, 36406, 41541, and 21292	2349
21		
22	15548, 1061, 27506, 18831, 363	2360
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(There are other counsel representing interested
24 parties also present in the courtroom gallery.)

1 Wednesday Afternoon Session

2 September 26, 2001

3 1:00 p.m.

4 --- --- --

5 P R O C E E D I N G S

6 --- --- --

7 (In open court with a jury present.)

8 THE COURT: Be seated, please.

9 MR. SEGAL: Good afternoon, Your Honor. Good
10 afternoon, ladies and gentlemen.

11 Judge, at this time, Mr. Evans can take the
12 witness stand. We are going to read the prior
13 testimony of Irwin Tucker, T-u-c-k-e-r, taken in the
14 Middleton versus Armstrong World Industry case on
15 July the 29th, 1997, Your Honor.

16 At the time of this deposition Mr. Tucker was
17 the retired director of research at Brown &
18 Williamson.

19 MR. WOODSIDE: Mr. Segal, can we --

20 MR. SEGAL: And prior to reading the testimony,
21 Your Honor, Mr. Woodside and I have entered into a
22 stipulation which we would like you to please give
23 to the jury. May I approach?

24 (At sidebar:)

1 MR. WOODSIDE: This is the same you read last
2 time.

3 THE COURT: You mean last --

4 MR. WOODSIDE: Yes.

5 THE COURT: Okay.

6 (In open court:)

7 THE COURT: All right. Ladies and gentlemen,
8 normally it is the jury's role to determine the
9 credibility of a witness by observing the witness'
10 demeanor on the witness stand.

11 Now, you will have the deposition testimony of
12 Irwin Tucker read to you. Mr. Tucker will not be
13 here today because he has passed away. Because you
14 will not be able to observe him, you should note, at
15 the time of this deposition, Mr. Tucker was 82 years
16 old and, according to his condition, suffered
17 impaired cognitive abilities resulting from the
18 residual effects of two strokes.

19 You should consider this information when you
20 hear Mr. Tucker's testimony

21 -- -- --

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23

24

1 IRWIN W. TUCKER,
2 being first duly sworn in deposition, testifies and
3 says as follows:

4 -- -- --

5 Q. Would you state your full name for
6 the record, sir.

7 A. Irwin W. Tucker.

8 Q. Mr. Tucker, as I understand it, you
9 are a chemist; correct?

10 A. Yes.

11 Q. What was your position when you began
12 your employment with B&W?

13 A. Director of Research.

14 Q. Did you serve as the director of
15 research for Brown & Williamson from 1953 until
16 you left there in 1960?

17 A. Yes.

18 Q. And were you hired for that position
19 by Tim Hartnett?

20 A. Yes.

21 Q. At the time you were hired, was he
22 the president of Brown & Williamson?

23 A. Yes, he was.

24 Q. I will try to -- in 1953-54 time

1 frame, did you perform any opinion -- did you
2 form any opinion concerning the validity of
3 using statistics to assess the adverse
4 consequences of smoking cigarettes?

5 A. Yes, I did have an opinion.

6 Q. And sir, what was your opinion?

7 A. My opinion was that it was not valid.

8 Q. Was your opinion that there were
9 studies that had been done utilizing statistics
10 and concluding that cigarette smoking was
11 associated with lung cancer; did you conclude
12 that those studies particularly were not valid?

13 A. Right.

14 Q. Is that correct? Did you ever
15 discuss the statistical invalidity of those
16 studies with Mr. Hartnett?

17 A. Yes.

18 Q. Did he agree with your opinion?

19 A. To the best of my knowledge, he did.

20 Q. And this was during the 1953-54 time
21 frame; am I correct?

22 A. Yes.

23 Q. Do you know whether or not
24 Mr. Hartnett read the studies that concerned

1 the statistical analysis of smokers and health?

2 A. No, I do not know.

3 Q. You attended a meeting in December of
4 1953 at the Plaza Hotel; am I correct?

5 A. Yes.

6 Q. And at that meeting, there had
7 gathered a number of CEOs from the major
8 tobacco companies in this country; correct?

9 A. Yes.

10 Q. Were the other CEOs that were present
11 at that meeting, did they express any knowledge
12 concerning the statistical studies that had
13 been done regarding cigarettes and lung cancer?

14 A. I can't recall any specific, but I'm
15 sure they -- they all shared a common view that
16 they were not significant.

17 Q. And that's what that meeting was
18 about, was it not, to discern or to discuss the
19 industry's response?

20 A. Right.

21 Q. To those studies?

22 A. Yes. Those studies and others.

23 Q. The mice study?

24 A. Yes.

1 Q. Mouse study. Any others besides the
2 statistical studies and the mice study?

3 A. No. That's it.

4 Q. In 1954, were you aware of any
5 statistical studies that concluded that
6 cigarette smoking was not associated with lung
7 cancer?

8 A. I can't recall.

9 Q. Did the Hill & Knowlton firm have
10 anything to do with arranging the meeting at
11 the Plaza Hotel in 1953?

12 A. I don't think they had anything to do
13 with arranging the meeting.

14 Q. They were in attendance at the
15 meeting; were they not?

16 A. Yes, at some point.

17 Q. At what point?

18 A. After the presidents met and they
19 decided to entertain proposals from public
20 relations organizations.

21 Q. And they and the presidents
22 ultimately retained the Hill & Knowlton firm?

23 A. Yes.

24 Q. Did the presidents decide at that

1 meeting that there would be a joint effort
2 undertaken by the tobacco industry to address
3 the publicity problem?

4 A. Yes.

5 Q. After the TIRC was formed, at the
6 Plaza Hotel?

7 A. Yes.

8 Q. Did it obtain office space somewhere?

9 A. I think that was provided by Hill &
10 Knowlton.

11 Q. It's in the same building as Hill &
12 Knowlton?

13 A. I think so, yes.

14 Q. Did they have any employees, the
15 TIRC, I mean?

16 A. No.

17 Q. Well, they were in the building of
18 Hill & Knowlton, I understand. Were they
19 actually in the office of Hill & Knowlton?

20 A. In close proximity.

21 Q. And Hill & Knowlton supplied the
22 employees, didn't they?

23 A. Yes.

24 Q. All right, sir. How many people, out

1 of seventy million, would need to die before
2 you would conclude that the product wasn't
3 safe, sir?

4 A. I would say better than 50 percent.

5 Q. Now, do you know whether or not, in
6 Southampton, biologic research was ever done?

7 A. No.

8 Q. You don't know one way or another?

9 A. No.

10 Q. Do you know whether or not, in
11 Southampton, there were specific tests for
12 cancer causing propensities in cigarette smoke
13 that were done?

14 A. No.

15 Q. Do you know whether or not Brown &
16 Williamson ever conducted tests to determine
17 whether agents in cigarette smoke were likely
18 to cause cancer in biological species?

19 A. No.

20 Q. You don't know, or they didn't?

21 A. They didn't.

22 Q. They did not do it?

23 A. No.

24 Q. Okay. Do you know whether Brown &

1 Williamson ever tested, for instance, cigar --
2 cigarette tar from Brown & Williamson
3 cigarettes to see whether it induced cancer on
4 the backs of mice?

5 A. No.

6 Q. They did not?

7 A. No.

8 Q. To your knowledge; is that right?

9 A. Right.

10 Q. And you -- and do you know whether
11 Brown & Williamson ever obtained from British
12 American Tobacco Company information on testing
13 that included application of cigarette tar to
14 the backs of mice to see whether cancer was
15 induced?

16 A. Not to my knowledge.

17 Q. Did you ever suggest to the Brown &
18 Williamson Tobacco Company that they conduct
19 tests on biologic species to determine whether
20 cancer could be induced by elements in
21 cigarette smoke?

22 A. No.

23 Q. Did you review in 1953 the results of
24 Dr. Wynder and Graham's experiments where

1 cigarette tar was applied to the backs of mice?

2 A. Yes.

3 Q. And cancer was induced?

4 A. Yes.

5 Q. Did Brown & Williamson attempt to
6 duplicate or verify those procedures in its own
7 laboratories?

8 A. No.

9 Q. Did you at the time you read the 1953
10 Wynder-Graham results, did you, yourself,
11 conclude that the experimental procedure had
12 been flawed?

13 A. Yes. I believe that they had a
14 supersensitive mouse that they were using, and
15 the application of condensed tobacco smoke was
16 unrealistic.

17 Q. It was unrealistic in what way?

18 A. In that that's not the way a human
19 being would be confronted with the assault.

20 Q. Okay. Let me ask it this way. At
21 the meeting at the hotel, the Plaza Hotel, in
22 1953, did the presidents create what became
23 known as the Tobacco Industry Research
24 Committee?

1 A. Yes.

2 Q. Did the TIRC utilize the public
3 relations firm Hill & Knowlton?

4 A. Yes.

5 Q. What was the purpose of hiring the
6 Hill & Knowlton public relations firm if the
7 goal of the TIRC was not to combat adverse
8 publicity caused by the medical studies that
9 had been published in the early 1950s?

10 A. It was to take cognizance of the
11 publicity and to formulate a response.

12 Q. Yes, sir. And that was the purpose
13 of the TIRC, wasn't it, sir?

14 A. Yes.

15 Q. Mr. Tucker, based upon all of the
16 information that you have learned from the
17 Scientific Advisory Board and its research and
18 elsewhere, as we sit here today, given all of
19 the knowledge that you have, do you believe
20 that cigarette smoking causes cancer?

21 A. No.

22 MR. SEGAL: And there are some counters to
23 that, Your Honor.

24 THE COURT: All right.

1 Q. Doctor, you testified earlier today
2 that you attended meeting of tobacco company
3 executives in late 1953 after publications came
4 to your attention regarding the possible
5 relationship between smoking and health issues;
6 is that correct?

7 A. Yes.

8 Q. And that meeting resulted, Doctor, in
9 the formation of the Tobacco Industry Research
10 Committee; did it not?

11 A. Yes.

12 Q. Now, the tobacco industry funded the
13 Tobacco Industry Research Committee; did it
14 not?

15 A. Yes.

16 Q. And it funded that committee to
17 conduct research on smoking and health; did it
18 not?

19 A. Yes.

20 Q. Was Brown & Williamson one of the
21 companies that funded research by the TIRC?

22 A. Yes.

23 Q. Was Philip Morris one of the
24 companies that funded research by the TIRC?

1 A. Yes.

2 Q. Was the American Tobacco Company one
3 of the companies that funded that research?

4 A. Yes.

5 Q. Was P. Lorillard one of the companies
6 that funded that research?

7 A. Yes.

8 Q. Was Reynolds one of the companies
9 that funded that research?

10 A. Yes.

11 Q. Was it the intention, Doctor, of the
12 founders of the TIRC that research would be
13 conducted by eminent independent researchers?

14 A. Yes.

15 Q. Isn't that correct; that they would
16 conduct their research in well-equipped
17 laboratories?

18 A. Yes.

19 Q. Wasn't it the intention of the
20 founders of the TIRC that research would be
21 conducted on a wide variety of issues?

22 A. Yes.

23 Q. Were the researchers conducted with
24 outside academic and medical institutions?

1 A. Yes.
2 Q. What kind of institutions were these
3 researchers connected with?
4 A. Universities and institutes.
5 Q. Can you remember any of the names of
6 these universities?
7 A. No, I can't.
8 Q. Well, do you recall the name "Harvard
9 University"?
10 A. Yes.
11 Q. Do you recall the name of any of the
12 academic institutions?
13 A. I think University of California.
14 Q. Yes, sir. Would it be fair to say,
15 Doctor, that there were also other similarly
16 credentialled universities in the United
17 States?
18 A. Yes.
19 Q. Were the researchers people who had
20 associations with those institutions?
21 A. Yes.
22 Q. And they maintained those
23 relationships with the institutions during the
24 course of their research --

1 A. Yes.

2 Q -- for the TIRC?

3 Doctor, I think you already testified,
4 also testified about the Scientific Advisory
5 Board --

6 A. Yes.

7 Q -- and the role that you played in the
8 selection of the Scientific Advisory Board.

9 What were the reputations generally of
10 the people that were selected to serve on the
11 Scientific Advisory Board?

12 A. Well, they were highly qualified and
13 well recognized in their professions.

14 Q. Did they also maintain relationships
15 with scientific and educational institutions?

16 A. Yes.

17 Q. Can you give us any examples?

18 A. Well, Clarence Cook Little, who was
19 associated with Roscoe Jackson Laboratory in
20 Maine.

21 Q. And I think you testified earlier,
22 Doctor, that he had been the president of a
23 major American university?

24 A. Yes.

1 Q. All right. Tell us something about
2 the expertise of the individuals who served on
3 the Scientific Advisory Board.

4 A. Well, Clarence Cook Little had been
5 president, I think, of the American Cancer
6 Society, cancer research.

7 Q. And were there other people who
8 served on the Scientific Advisory Board who had
9 similar levels of expertise?

10 A. Yes.

11 Q. Did the members who served on the
12 Scientific Advisory Board also come from a
13 variety of different academic disciplines?

14 A. Yes.

15 Q. Did that include medical doctors?

16 A. Yes.

17 Q. Did that include statisticians?

18 A. Yes.

19 Q. Do you recall a Dr. Wilson from
20 Harvard University?

21 A. Yes.

22 Q. What do you know about him?

23 A. Well, he was highly regarded in the
24 field of statistics.

1 Q. Was he an epidemiologist?
2 A. I'm not sure.
3 Q. All right. Now, did Brown &
4 Williamson fund research into the relationship
5 between smoking and health which was funded
6 through and approved by the Scientific Advisory
7 Board of the TIRC?
8 A. Yes.
9 Q. So it's true, is it not, Doctor, that
10 through the TIRC, Brown & Williamson funded a
11 great variety of research into these important
12 questions of smoking and health?
13 A. Yes.
14 Q. And the purpose of the Tobacco
15 Industry Research Committee was to combat
16 adverse publicity; correct?
17 A. No.
18 Q. Now, Doctor, isn't it true that the
19 purpose of the TIRC was to combat adverse
20 publicity? You may answer.
21 A. No.
22 Q. Did you have any -- you personally
23 have any involvement in the selection of the
24 Scientific Advisory Board members?

1 A. Yes.

2 Q. And do you recall who -- what was the
3 membership of the Scientific Advisory Board at
4 the time the TIRC was initiated?

5 A. Well, they weren't -- the Scientific
6 Advisory Board had not been appointed yet.

7 Q. I understand that, and I didn't mean
8 to suggest. But when they were appointed in
9 the formative months of the TIRC you were aware
10 who they were?

11 A. Yes.

12 Q. And was one of the members of the
13 TIRC Dr. Paul Kotin?

14 A. Yes.

15 Q. Did you know Dr. Kotin?

16 A. Yes.

17 Q. And did you understand Dr. Kotin to
18 be an eminent and respected scientist?

19 A. Yes.

20 MS. MIDDLEHOFF: That concludes our counter,
21 Your Honor.

22 THE COURT: All right. Does that complete the
23 reading of the Tucker deposition?

24 MR. SEGAL: It does, Your Honor.

1 THE COURT: All right.

2 MR. SEGAL: Your Honor, at this time, I would
3 like to read the prior testimony of Edward A.
4 Horrigan, H-o-r-r-i-g-a-n, Jr., taken in Dewey
5 versus R. J. Reynolds Tobacco Company, et al., on
6 August 30, 1984. Your Honor, at the time of this
7 deposition, Mr. Horrigan was the president and chief
8 operating officer of R. J. Reynolds Industries.

9 May I proceed?

10 THE COURT: All right.

11 -- -- --

12 EDWARD A. HORRIGAN, JR.,
13 being first duly sworn in deposition, testifies and
14 says as follows:

15 -- -- --

16 Q. Mr. Horrigan, I take it at this point
17 in time you are employed at R. J. Reynolds
18 Tobacco Company?

19 A. I'm presently serving as president
20 and chief operating officer of the parent
21 company, R. J. Reynolds Industries.

22 Q. It's your position, is it not, that
23 more research is needed on the issue before a
24 definitive answer can be given to this question

1 of whether smoking causes lung cancer or other
2 human disease?

3 A. Research will be needed as long as
4 the question remains unresolved.

5 Q. Since the question is unresolved at
6 this point in time, it follows, does it not,
7 that more research is needed?

8 A. Yes.

9 Q. As of today?

10 A. As of today, there is no answer, so
11 there is more research ongoing.

12 Q. Isn't that the same position that's
13 been taken by the tobacco industry going back
14 30 years; that more research has been needed?

15 A. The position taken by the tobacco
16 industry is that there has been no causal link
17 established and, therefore, as long as there is
18 this open question, then there is an
19 environment for scientific research to get at
20 the fundamental questions.

21 Q. To your knowledge, that position,
22 namely, that it is an open question, has been
23 taken by the industry, including R. J.
24 Reynolds, going back at least as far as 30

1 years; correct?

2 A. As long as the industry has stood
3 accused of causing what we are alleged to have
4 caused, we say that, as long as science
5 establishes that there are other sides to the
6 issue, then that's correct, that has been our
7 position from the beginning.

8 Q. Just to make sure I understand your
9 previous testimony correctly, sir, am I correct
10 in my understanding that research and
11 development at R. J. Reynolds does not do any
12 direct research in tobacco and health?

13 A. That's correct.

14 Q. And that has never done so, to your
15 knowledge?

16 A. To the best of my knowledge.

17 MR. SEGAL: And there are some counters to
18 that, Your Honor.

19 THE COURT: All right.

20 Q. So that you do not -- and I take it,
21 have not for some time taken the position that
22 cigarette smoking is safe?

23 A. We do not take the position that
24 cigarettes are safe or harmful. We

1 say it is an open question.

2 Q. Getting back to my question then, you
3 do not take -- I understand your answer. But
4 to break it down, your company does not now nor
5 did it in 1980 take the position that cigarette
6 smoking is safe; correct?

7 A. We have never said that.

8 Q. When you say never --

9 A. I mean, we have not said that during
10 my time.

11 Q. Is it a fair statement of your
12 industry's position and R. J. Reynolds'
13 position that statistical association alone
14 does not prove cause and effect?

15 A. Statistical association alone should
16 not be used as the basis for drawing a
17 conclusion.

18 Q. What types of studies in addition to
19 statistical studies, in your understanding, is
20 reported to you by your experts are required to
21 prove cause and effect?

22 A. You are getting into, in my judgment,
23 deep science here. We do not, as tobacco
24 executives, make the scientific grants because

1 we are not qualified.

2 We have a board of scientists from
3 various disciplines and they judge the grants,
4 and they judge the kinds of research that will
5 help us get at the answers, and we have
6 deferred to them as we would defer to counsel
7 on litigating matters.

8 Q. But Mr. Horrigan, those scientists
9 that are on that board keep you apprised of
10 what they are doing, don't they?

11 A. Of course.

12 Q. Because, in the end, it is the
13 executives that have to make the policies about
14 tobacco and health, correct; scientists don't
15 make the policies for RJR; you do?

16 A. We make the policies based on tobacco
17 and health, and we have to keep abreast of the
18 continued updates in that area, yes.

19 Q. So in order to, as you state, make
20 policy, are you given reports from time to time
21 from scientists about the types of research,
22 the type of studies, not the specific results,
23 but the types of studies that would have to be
24 performed in order to establish a cause-and-

1 effect relationship other than or in addition
2 to statistical association?

3 A. In terms of pure science, the grants
4 that are given are given based upon scientific
5 recommendations. As to what they think they
6 need to look at to continue to get at the
7 answer.

8 Q. If they describe the types of studies
9 that have to be done which should be funded in
10 order to get the answer --

11 A. Then we fund it.

12 MS. FORBES: Thank you.

13 MR. SEGAL: One more, Your Honor.

14 THE COURT: All right. That completes the
15 reading of the Horrigan deposition?

16 MR. SEGAL: It does, Your Honor.

17 THE COURT: All right.

18 MR. SEGAL: Next one we have got here is, this
19 is the prior testimony of Robert Sanford,
20 S-a-n-f-o-r-d, taken in Minnesota versus
21 Philip Morris, Inc, et al., September 4th, 1997.
22 Dr. Sanford was associate director of research and
23 development at Brown & Williamson.

24 -- -- --

1 ROBERT SANFORD,
2 being first duly sworn in deposition, testifies and
3 says as follows:

4 -- -- --

5 Q. Sir, would you please introduce
6 yourself to the ladies and gentlemen of the
7 jury.

8 A. My name is Robert A. Sanford.

9 Q. Where do you live, sir?

10 A. I live in [DELETED].

11 Q. You are a retired gentleman?

12 A. Yes.

13 Q. Do you understand your deposition is
14 being taken here today because you spent a
15 large part of your professional career working
16 for Brown & Williamson; correct?

17 A. Correct.

18 Q. When did you start with Brown &
19 Williamson?

20 A. 1966.

21 Q. When did you retire, sir?

22 A. 1983 -- no '85.

23 Q. Now, do you currently have a
24 consulting contract with Brown & Williamson?

1 A. No.

2 Q. You had a consulting contract with
3 Brown & Williamson for a year after you
4 retired, didn't you, sir?

5 A. That's correct.

6 Q. Now, you said you started with Brown
7 & Williamson in 1966. What position did you
8 have then?

9 A. I don't recall whether it was
10 Assistant -- I believe it was Associate
11 Director of Research.

12 Q. Now, when you joined the staff of
13 Brown & Williamson in 1966, were there any
14 medical doctors on staff?

15 A. No.

16 Q. The entire time up until you retired
17 in 1985, were there any medical doctors
18 employed by Brown & Williamson?

19 A. No.

20 Q. And when you joined Brown &
21 Williamson in 1966, were there any
22 toxicologists employed by Brown & Williamson?

23 A. No.

24 Q. And for the entire time that you were

1 with Brown & Williamson, were there any
2 toxicologists who were employed by Brown &
3 Williamson?

4 A. No.

5 Q. Okay. Now, how long did you hold the
6 position of associate director of research at
7 B&W?

8 A. For approximately a year.

9 Q. What position did you take then --

10 MR. SEGAL: Did I skip something?

11 MR. EVANS: The previous page, before.

12 MR. SEGAL: I'm sorry, give me a page number,
13 please.

14 MR. EVANS: Page 20.

15 MR. SEGAL: May I approach, Your Honor?

16 THE COURT: Sure.

17 MR. SEGAL: Thanks.

18 Q. Now, did you retire as vice president
19 of product and process?

20 A. I left that position in 1983.

21 Q. What position did you take then?

22 A. I was assigned to the CEO for --

23 Q. What are you -- I'm sorry, what do
24 you mean, you were assigned to the CEO?

1 A. I left that position and became
2 responsible to the CEO.

3 Q. The chief executive officer of Brown
4 & Williamson?

5 A. Right.

6 Q. Who was that at the time?

7 A. A Dr. I.W. Hughes.

8 Q. Brown & Williamson did not do any
9 biological testing in-house, did it, sir?

10 A. Correct.

11 THE COURT: Counters?

12 MR. WOODSIDE: There were no counters.

13 THE COURT: All right. That completes the
14 reading of the Sanford deposition?

15 MR. SEGAL: It does, Your Honor.

16 THE COURT: Now we are going to publish some
17 more documents?

18 MS. McHENRY: We are, Your Honor.

19 THE COURT: All right.

20 MS. McHENRY: At this time, Your Honor,
21 plaintiffs move the admission of some Group M
22 documents, and these include 21648, 30960, 30958,
23 15531, 38932, 38921, 35965, and 10383.

24 THE COURT: All right. Any objection to their

1 admission beyond what we have already put on the
2 record.

3 MR. KLEIN: No, Your Honor.

4 THE COURT: All right. All those exhibits then
5 will be admitted into evidence and made a part of
6 the record in this proceeding, may be published to
7 the jury at the convenience of counsel
8 (The exhibits are so admitted.)

9 MS. McHENRY: Thank you. The first document we
10 would like to publish is 21648.

11 Ladies and gentlemen, this document is styled
12 "The Importance Of Biological Research." Its author
13 is E.S. Harlow, the assistant managing director of
14 research at American tobacco.

15 The only kind of research which may be
16 expected to impress the medical profession is
17 that obtained by the pharmacologist or the
18 physiologist in a biological laboratory. It
19 was a recognition of this fact that prompted us
20 to provide for a biological department when the
21 research laboratory was designed.

22 The tobacco industry is very much in need
23 of some friendly research in this field. The
24 company that first engages in active biological

1 research and publishes its results could not
2 fail to impress the leaders in the medical
3 profession with the importance of their work.

4 Such research would also provide material
5 for an approach to the medical profession, if
6 that was desired. Such a move would serve the
7 double purpose of improving the attitude of the
8 medical profession toward the tobacco industry
9 and, particularly, reflecting credit upon the
10 company with the foresight to engage in the
11 work.

12 Having our own biological laboratory
13 would make it possible to conduct more
14 extensive experiments, particularly on
15 competitive brands, than seems proper in an
16 institution which is publicly supported. As an
17 insurance against possible attacks in the
18 future, we could, to advantage, test everything
19 we use in our products. Our records would then
20 provide a clean bill of health for every brand
21 which we market, one which would be acceptable
22 to the medical profession.

23 Aside from the direct benefits to accrue
24 from the further promotion of biological

1 research, there is an intangible but a very
2 important additional benefit.

3 The American Tobacco Company would be in
4 such a position, in the event of unforeseen
5 developments, that they could show evidence
6 that every effort had been put forth by them to
7 insure the most wholesome product to the
8 consumer; and that they had spared no pains in
9 their cooperation with the medical profession
10 to discover and eliminate any possible ill
11 effects of smoking on health.

12 There are counters.

13 THE COURT: All right.

14 MS. MIDDLEHOFF: As a result of discussions
15 with Mr. Neiley, Dr. Haag was asked nearly a year
16 ago to look about for a man having the desired
17 qualifications.

18 It was not until recently that Dr. Haag could
19 find anyone whom he considered well qualified for
20 the position. He has now recommended Dr. Larsen,
21 who is a young physiologist with a good background,
22 experience, and a fine personality. He has a large
23 number of published articles to his credit. In
24 short, he has an established reputation and is a

1 member of the leading scientific societies in this
2 field, the American Physiological Society and the
3 Society for Experimental Biology and Medicine.

4 MS. McHENRY: May I approach, Your Honor?

5 THE COURT: All right.

6 MS. McHENRY: The next document is 30960.

7 THE COURT: All right.

8 MS. McHENRY: This is a memorandum from the
9 American Tobacco Company to Mr. W.B. Young, vice
10 president, from W.R. Harlan, managing director,
11 research and development. The date is May 28,
12 1964. It is stamped confidential. The subject is
13 consulting arrangements with Dr. Arthur W. Burke,
14 Jr.

15 We are attaching a copy of a letter-
16 contract we have recently executed with
17 Dr. Arthur W. Burke, Jr. You will recall
18 Dr. Burke is the man about whom I spoke to you
19 in telephone conversation concerning our paying
20 his moving expenses from Providence, Rhode
21 Island, to Richmond, Virginia.

22 After considerable discussion with
23 Dr. Larsen, chairman of the department of
24 pharmacology at the Medical College of

1 Virginia, it was agreed that Dr. Burke would be
2 engaged initially to work under our grant at
3 Medical College of Virginia and would receive
4 an appointment of assistant professor of
5 pharmacology on their staff. Dr. Burke has
6 received his formal appointment from President
7 Smith and will begin work at the college on
8 July 1. It is anticipated that he will
9 continue in this status for one year, at the
10 end of which time he will become an employee of
11 the American Tobacco Company in the Department
12 of Research and Development.

13 Dr. Burke is eminently qualified to
14 coordinate our research efforts in the
15 biological fields.

16 Dr. Burke is, at present, advising with
17 us in preparation for the inclusion of
18 biological research laboratories in our new
19 facilities to be built at Bermuda Hundred. We
20 anticipate that his headquarters will be in
21 these new facilities when they are completed,
22 and after his year of employment under the
23 grant. When he becomes a member of our
24 permanent staff, it is expected that he will

1 retain an appointment at the college, but with
2 no remuneration. This, we feel, also is a
3 decided advantage to us.

4 And you can see the close of the document,
5 there it is also stamped confidential.

6 I believe there are no counters, Your Honor.

7 THE COURT: All right.

8 MS. McHENRY: The next document we would like
9 to publish is 30958. May I approach, Your Honor?

10 THE COURT: Yes.

11 MS. McHENRY: This is a memo dated September
12 18, 1964, to H.S. Harlow, Department of Research and
13 Development, American Tobacco Company, Richmond,
14 Virginia. From Arthur W. Burke, Jr., Ph.D., M.D.,
15 Re: Discussion of biomedical section, American
16 Tobacco Company, Department of Research and
17 Development.

18 On 17 September '64, the undersigned met
19 with Mr. Harlow at the research and development
20 labs for the purpose of discussing the
21 biomedical section which is to be included in
22 the new laboratories and to be located at
23 Bermuda Hundred, Hopewell, Virginia. The main
24 subject was that of personnel which should be

1 sought to facilitate the opening of this area
2 of research.

3 Although it is difficult to delineate or
4 characterize the man for the immediate needs in
5 the area of biomedical research, several types
6 of training were mentioned which seem to be
7 pertinent to the conduct of research in this
8 area.

9 Firstly, a senior scientist with a
10 background in either physiology or pharmacology
11 would be desired. This man, ideally, might
12 have leanings in a so-called biophysical
13 approach to biological experimentation.

14 Secondly, a researcher with predominant
15 leanings in biochemistry should be sought.
16 This would not preclude training in the
17 aforementioned disciplines, rather these might
18 well supplement his qualifications.

19 Thirdly, the services of a
20 biostatistician would be mandatory. This might
21 well be covered by a person who is not
22 exclusively assigned to work in the biomedical
23 area of in-house research. The biostatistician
24 would also serve to advise and assist in the

1 appraisal and digestion of researches and
2 publications, other than those stemming from
3 the in-house research program.

4 If you would drop down, Arthur W. Burke,
5 Jr.

6 There are no counters

7 THE COURT: All right.

8 MS. McHENRY: May I approach, Your Honor?

9 THE COURT: Yes.

10 MS. McHENRY: The next document is 15531.

11 THE COURT: All right.

12 MS. McHENRY: This is dated November 20, 1964,
13 it is the author is Helmut Wakeham, vice president
14 of research and development at Philip Morris. The
15 recipient is Mr. Paul Smith, vice president and
16 general counsel at Philip Morris.

17 I learned this morning that the American
18 Tobacco Company has employed a Dr. Arthur W.
19 Burke, Jr., Ph.D., M.D., to direct an internal
20 biomedical research program which they are
21 setting up in their new laboratory at Bermuda
22 Hundred. Dr. Burke is a biophysicist who has
23 done quite a bit of cancer research at a
24 hospital medical institute in Providence, Rhode

1 Island. We know him to be a very competent
2 person and suspect that the program which he is
3 setting up at American will be a fairly
4 extensive one.

5 We also learned that, although American
6 did not mention it at the meeting in
7 Washington, they are doing mucus flow tests in
8 the live cat by the technique which we
9 described at the Federation of American
10 Societies for Experimental Biology meeting in
11 Chicago last April.

12 This work is being done at MCV.

13 Burke is an expert in animal testing.

14 And it is signed by Helmut Wakeham.

15 There are no counters.

16 THE COURT: All right.

17 MS. McHENRY: The next document is 38932. May
18 I approach?

19 THE COURT: All right.

20 MS. McHENRY: The date of this document is July
21 30, 1965. The author is E.S. Harlow, assistant
22 managing director of research at American Tobacco.
23 The recipient is Cyril Hetsko, general counsel at
24 American Tobacco.

1 Personal and confidential, July 30, 1965.

2 Dear Cy,

3 This summarizes briefly the scope of our
4 contemplated biological research program at the
5 Research and New Products Division Laboratory
6 under construction at Bermuda Hundred.

7 The biological research section will be
8 under the supervision of Dr. Arthur W. Burke,
9 Jr., who holds both an M.D. degree as well as a
10 Ph.D. in biophysics. Working with Dr. Burke
11 will be one other senior scientist, Trent R.
12 Lewis, who has a Ph.D. degree from Michigan
13 State University. His particular fields
14 include physiology, biochemistry, bacteriology
15 and nutrition and will come to us in December
16 from the Laboratory of Medical and Biological
17 sciences, Division of Air Pollution, U.S.
18 Public Health Service, Cincinnati, Ohio. He
19 has worked there in the physiology section.
20 Two or three other persons will complete the
21 group. These latter will probably be trained
22 technicians.

23 A limited program is planned dealing
24 principally with irritation studies, evaluation

1 of current method used in bioassay of smoke and
2 smoke components, such as ciliastatic
3 techniques and the effects of smoke, smoke
4 components, and related compounds on pulmonary
5 function and pulmonary clearance. Included
6 will be such projects as the the evaluation of
7 the use of carbon monoxide levels in blood as
8 means of determining amount of smoking in
9 humans.

10 It has been our experience that reliance
11 upon outside laboratories to perform such
12 functions requires almost constant contact and,
13 even under such conditions, we are never quite
14 sure that the necessary emphasis has been given
15 to control of all factors having a bearing on
16 the results of the experiments.

17 This situation pertains at independent
18 consulting laboratories and at institutional
19 labs as well. We are convinced that techniques
20 developed by us will be infinitily less suspect
21 and corroboration of tests according to our
22 specific instructions can be accomplished in
23 outside laboratories much more readily; and
24 that the results of such tests will sustain the

1 scrutiny which is given to data of this sort if
2 presented in evidence.

3 We have not attempted to outline in
4 detail the work that we intend to do. In
5 general, it will require the use of small
6 animals, rabbits, rats and mice.

7 Dr. Burke will also be charged with the
8 responsibility of coordinating our biological
9 research carried on at other laboratories under
10 our sponsored programs and maintaining close
11 liaison. He is a very capable individual, is
12 becoming thoroughly acquainted with our
13 problems and promises to become a splendid
14 representative for the company in areas of his
15 competency.

16 We hope the above will satisfactorily
17 fill your needs.

18 Sincerely, Ed, E.S. Harlow.

19 The next document is 38921. May I approach?

20 THE COURT: Yes.

21 The author of this document is Janet Brown, who
22 is outside counsel to American Tobacco. You see
23 there Chaddbourne, Parke, Whiteside and Wolff. The
24 date is September 22, 1965. And it is marked

1 personal and confidential, and it is to Cyril F.
2 Hetsko, Esquire, vice president and general counsel,
3 the American Tobacco Company, New York, New York.

4 Dear Cy:

5 I enclose herewith a report in the form
6 of a confidential memorandum to you, on our
7 meeting with Harlan and Harlow held in your
8 absence on vacation.

9 As you will note, it appears that the
10 employment of Dr. Burke was initially discussed
11 with Mr. Young, according to Harlan and Harlow,
12 and approved more than a year and a half ago.

13 Harlan and Harlow commented that they
14 wished all the matters we discussed had been
15 explored at the time Young authorized the
16 employment of Burke.

17 I think it's fair to say that Harlan and
18 Harlow were very seriously impressed, by the
19 time we concluded our discussion, with the
20 policy implications of the program as
21 proposed. They said they had been giving the
22 matter some thought during the preceding weeks,
23 and I think they had already formed a general
24 impression of the areas that we would be

1 covering.

2 Both men concluded that they would not
3 wish to pursue the program as originally
4 proposed, and asked our help in considering
5 other ways and means to achieve its fundamental
6 purposes.

7 We, of course, agreed to give what
8 assistance we could. They understand that you
9 may wish to review the matter with them again,
10 and in any event they are anxious promptly to
11 formulate, with your and our assistance, some
12 alternate plan. We must also explore the
13 substantial number of problems arising from a
14 revision of plans here -- what to do with
15 Burke, Lewis, et cetera, and how to do it, to
16 mention only a few.

17 Signed, Janet.

18 The next document, Your Honor, is 359605. May
19 I approach?

20 THE COURT: Yes. It's 35965.

21 MS. McHENRY: Sorry.

22 THE COURT: It's all right.

23 MS. McHENRY: I apologize.

24 This is a confidential memorandum to Mr. Hetsko

1 Re: Conference with Messrs. Harlan and Harlow on
2 Wednesday, August 25, 1965, at company law library.
3 The author of this document is Janet Brown, outside
4 counsel to American Tobacco.

5 Mr. Neaher, Mr. Henson and I attended.
6 The conference began at 9:30 a.m. and concluded
7 at 4:30 p.m.

8 I opened with the explanation that we
9 were there at your request. Our only purpose
10 was to explore with them, first, the
11 background, purposes and proposed modus
12 operandi of the postulated, quote, biological,
13 end quote, program which you had only recently
14 learned about, and second, to review some of
15 the most fundamental problems a program of the
16 nature indicated in Mr. Harlow's memorandum to
17 you would pose for the company in its public,
18 medical and legal positions in the health
19 controversy.

20 At the conclusion of our conference,
21 Harlow stated the opinion that the program
22 contemplated would make the company's past and
23 current position in the health field untenable.

24 Harlan thought that, quote, we'll have to

1 give it, the program, up, end quote. Harlow
2 ultimately stated that, while the program was
3 important and he wanted very much to do it, he
4 would certainly not want to do anything that,
5 quote, has an impact on the company's position
6 or if it makes that position any less sound
7 than it is now.

8 (2) genesis of proposed, quote,
9 biological, end quote, research program:

10 Two prime motives engendered the move to
11 institute a company biological research
12 program. One was deep dissatisfaction with the
13 conduct of experimental work by independents in
14 this area. The other was the need for
15 commercial security in the development of new
16 products.

17 MCV work is done by graduate students:
18 Volunteers, in effect, of widely varying
19 competence and abilities, who lack, more often
20 than not, any overriding personal interest in
21 maintaining the highest standards; i.e., those
22 the company laboratory would maintain.

23 There is strong feeling, thus, that
24 experimental work which has had to be farmed

1 out to others lacks the scientific standards
2 the company and the nature of the work
3 demands. Obviously, when the devising,
4 execution and supervision of the work is
5 sloppy, the results are of questionable
6 scientific meaning.

7 In short, outside research caliber is not
8 high, competence in problem analysis is
9 dubious, and standards of technique development
10 and execution have been far below the company's
11 own standards.

12 Haag and Larson have long recognized
13 these facts. In many discussions had with them
14 on this score, they have urged that the
15 laboratory do its own work.

16 Recent, over the past few years, repeated
17 discussions with Larson have again resulted in
18 his strong recommendation that the company
19 undertake its own biological programs,
20 particularly in the growing field, scientific
21 and commercial, of investigation of effects of
22 smoke components on lung clearance mechanisms,
23 cilia, mucus flow, et cetera.

24 Haag and Larson have long thought well of

1 this work and have felt that the company is
2 most competent to do it properly.

3 (3) purposes and nature of proposed,
4 quote, biological, end quote, research
5 program:

6 However, a specific factual description
7 of the proposed work and the aim of individual
8 projects supports the concept of a much broader
9 scientific application and purpose; i.e, one
10 indissolubly linked to the health controversy,
11 and a much wider potential scientific
12 significance for the, quote, irritation, end
13 quote, studies that can reasonably be
14 contemplated by a, quote, taste, unQUOTE, or
15 quote, palatability, unQUOTE, concept.

16 The overall purposes appear to be several
17 fold:

18 (1) to develop techniques to measure and
19 evaluate the biological effects of new AT
20 company, and other, products, and to compare
21 new AT company products, among themselves and
22 with others, with respect to such effects,
23 particularly in relation to ciliary function.

24 (2) to develop and refine techniques now

1 being used by others to test biological
2 effects, so as to have means at hand to confirm
3 or refute assertions based on such techniques.

4 (3) to develop new and different criteria
5 and techniques with respect to measurement of
6 biologic effects, so as to have means at hand
7 to test future criteria and techniques
8 developed by others and to confirm or refute
9 any assertions respecting biological effects
10 which may be forthcoming in the future.

11 Exploration of the fundamental problems
12 posed by the proposed program.

13 In the afternoon I explained at the
14 outset that you had asked us (1) to bring to
15 their attention the most fundamental of the
16 problems we anticipated the company would face
17 when it undertook the described program, and
18 (2) to explore with them all the ideas they had
19 respecting meeting those problems.

20 The simplest way to proceed appeared to
21 be to examine the implications of the proposed
22 program as it is likely to be characterized by
23 interested persons on the outside, whether
24 friend or foe. We think it most likely to be

1 broadly viewed.

2 (1) as a biological research program into
3 certain questions of tobacco use in relation to
4 human health;

5 (2) as a cancer research program into
6 certain questions of the relationship of
7 smoking to human cancer;

8 (3) as an animal research program and a
9 smoke-component research program relating to
10 certain questions of tobacco use and human
11 health.

12 Any undertaking by the company, itself,
13 in areas 1 and 2 above can be argued to imply
14 not simply an admission of competence to
15 conduct such research, but an assertion of such
16 competence.

17 Such a position is fundamentally in
18 conflict with the company's past policy and
19 position respecting its proper function in
20 scientific research regarding tobacco
21 products.

22 While that raises a host of problems, the
23 most serious consequences appear to us to lie
24 in the degree to which the company thereby

1 undermines and perhaps even negates its legal
2 position respecting the, quote, reasonableness,
3 end quote, of its past conduct of scientific
4 research, including not doing such, quote,
5 biological, unquote, research.

6 Similarly, any undertaking by the company
7 itself in area 3 above can be argued to
8 admit -- and indeed if it is the company's own
9 work the company will not want to deprecate it
10 and will very likely have to assert -- a
11 significance for such work in terms of human
12 health.

13 That too raises many conflicts with the
14 company's past position in the cancer, and
15 broader health, controversy. Among the many
16 other problems posed, the fundamental question
17 is raised on what basis the company can, to the
18 public or in any other forum, then deny the
19 asserted significance of past, and future,
20 results of all other animal experiments and
21 smoke-component testing.

22 When the company asserts competence to
23 conduct its own biological research into
24 certain aspects of human health, it opens for

1 evaluation the question whether it acted
2 reasonably in not instituting biological
3 research long before now.

4 A substantial scientific literature
5 extending back over many decades has asserted a
6 great variety of pathological effects from the
7 use of tobacco. See, e.g., Haag, Larson and
8 Silvette.

9 Tobacco.

10 A variety of cancers, pulmonary and
11 circulatory diseases have long been claimed to
12 be tobacco linked. Lung cancer, emphysema,
13 heart and peripheral circulatory disease have
14 already become subjects of suits.

15 If the company can now inform itself
16 respecting biological effects of smoking, it
17 will be argued that it could and should have
18 done so in all these areas, years ago.

19 Ample funds were at the company's
20 disposal. Researchers with M.D. degrees were
21 available to devise, conduct and evaluate
22 experiments on animals and man.

23 Laboratory facilities for such work could
24 easily have been provided. What has been found

1 by independent scientists over the years, it
2 will be argued, could have been found long
3 since by the manufacturer whose primary
4 responsibility it was.

5 The question will be raised whether a
6 reasonably prudent manufacturer capable of
7 conducting biological research would not have
8 instituted biological testing programs in the
9 1920s, or 1930s, or 1940s, eras in which, as
10 evidenced by the Haag, Larson, Silvette book,
11 red flags of warning respecting serious health
12 questions were being raised in the scientific
13 literature.

14 It will be argued that, if such a program
15 was not instituted earlier, it should at least
16 have been begun in 1950-1953, with publication
17 of the four retrospective studies showing
18 association with lung and other cancers.

19 Or, if not then, why not a year ago, with
20 publication of the report of the Surgeon
21 General's advisory committee?

22 Instituting a biological program today
23 will be argued to be an implied admission that
24 the company believes it has not in the past

1 been doing all it could and should have been
2 doing to find the scientific facts respecting
3 tobacco use and health.

4 We can anticipate, too, that it will be
5 argued to be an implied admission that the
6 company accepts that smoking has been shown to
7 be a cause of pulmonary and other disease.
8 Why, otherwise, would it now institute such a
9 program, reversing its fundamental policy as
10 enunciated in litigation by company officials?

11 Your Honor, may I get a drink?

12 THE COURT: You may. Why don't you just take
13 that and put it right here.

14 MS. McHENRY: Would that be all right?

15 THE COURT: Sure.

16 MS. McHENRY: Thank you.

17 (2) initiation of a cancer research
18 program.

19 We think the program can without doubt be
20 characterized as a, quote, cancer research
21 program, unquote, at least in good part. For
22 one thing, if cancer research is not involved,
23 why has the company employed Dr. Burke, an M.D.
24 whose principal research and medical experience

1 is in the cancer field?

2 When the company hires a man of such
3 qualifications, it is difficult to deny all
4 intention to make any use of them.

5 Any, quote, cancer research, closed
6 quote, program initiated today by the company
7 raises all the problems raised by the broader
8 concept of, quote, biological research,
9 unquote, but in a more intensified form. The
10 reason for the intensification is two fold.

11 First, lung cancer is still widely
12 regarded by the public and even by many
13 professionals as the most serious health
14 issue.

15 Second, the vast majority of the lawsuits
16 involve cancer. Thus the issue of possible
17 liability most frequently resolves around
18 cancer causation.

19 All the arguments set out above will be
20 urged before the scientific community and the
21 public: The company should have started,
22 quote, cancer research, unquote, long since;
23 its reversal of policy concedes (1) the
24 causation point and (2) that the company has

1 been derelict in the past in its
2 responsibilities for cancer research; compared
3 to the magnitude of the problem and of the
4 company's resources, the, quote, cancer
5 research program, unquote, is, quote, too
6 little and too late, end quote, far less than
7 a, quote, reasonable, unquote, manufacturer of
8 this size should be doing; the scope, nature,
9 projects chosen, funds, equipment, personnel
10 are utterly inadequate by comparison with the
11 problem and the company's resources.

12 (B) problems of, quote, significance,
13 unquote, of the company's experimental
14 program.

15 It will be argued that the company would
16 not itself undertake an experimental program it
17 did not believe significant for human health
18 problems.

19 The company's ultimate biological concern
20 is with man who smokes. The proposed
21 experiments are linked to postulated mechanisms
22 of cigarette-cancer causation in man.

23 The supervisor of the company's, quote,
24 biological, unquote, program holds an M.D.

1 degree, i.e., is an expert in human health and
2 disease, and his research experience is largely
3 in cancer.

4 The second senior research man has spent
5 a number of years establishing, quote,
6 significant, unquote, biological effects of
7 auto exhaust pollution in animals. Under all
8 these circumstances, on what basis would the
9 company deny that the animal experimentation
10 program is designed to test aspects of the
11 relationship of smoking to respiratory health
12 and even lung cancer in man?

13 Indeed, if the company is not to be
14 accused of engaging in futile biological
15 exercises, it must assert the scientific
16 validity of its program.

17 If the company's own animal experiments
18 are to be related to human health, on what
19 basis can the company deny significance for man
20 to animal experiments in which condensed smoke
21 and smoke components have produced cancers and
22 other pathological changes: Deny, that is,
23 that animal experiments demonstrate that
24 cigarette smoke is carcinogenic to the lung of

1 man.

2 The testimony of expert witnesses who
3 sincerely question the significance for man of
4 the proposed type of animal experimentation is
5 subject to be eroded through cross-examination
6 about the company's own animal experiments.
7 Their integrity in testifying for the company,
8 and that of the company is producing such
9 witnesses will be called into question.

10 Company sponsorship of independent
11 investigators and institutions who choose to
12 conduct animal experiments, however, carries no
13 necessary admission in and of itself that the
14 company considers such research significant in
15 terms of human health.

16 Such sponsorship is open to many
17 different constructions. Independent
18 scientists have many reasons for wishing to
19 pursue such research. And there are many
20 reasons, short of any outright admission of
21 significance in terms of health, that the
22 company might agree to sponsor such
23 scientists.

24 The company need not adopt the work, the

1 results or even the construction, the
2 independent investigator might put on the
3 results, as its own.

4 But when the company, itself, begins to
5 conduct animal research of the sort proposed,
6 under all the circumstances outlined above, the
7 conclusion that the company views these
8 experiments as significant in terms of health
9 would be all but inescapable in our opinion.

10 And the work and the results being the
11 company's own, it would be in no position to
12 divorce itself from the experiments or the
13 findings, or to do anything but adopt them
14 fully.

15 This brought us to the general topic of
16 all the tangled internal problems posed in the
17 administration of such a program by the
18 company.

19 For example, to what use will the company
20 put the findings of its experiments? Will all
21 projects discussed be carried out? Will all
22 projects begun be carried to conclusion?

23 Will all results be published? Will all
24 results be incorporated in new products? If

1 not, what explanations for failure to do so
2 will be advanced? How is the significance of
3 the findings to be interpreted, and by whom?

4 If the company comes up with findings
5 which can be interpreted to support some
6 causation hypothesis, what would it propose to
7 do with them, and how, and when?

8 In other words, possible claims of
9 suppression of evidence, or misinterpretation
10 of significance, or failure to embody findings
11 in new products must be anticipated from any
12 outside hostile quarter or from disgruntled
13 employees.

14 We did not, however, go into these
15 problems in any detail at this time. Harlan
16 and Harlow had long since stated their
17 conclusion that the program could not be
18 conducted by the company in the manner they had
19 envisioned it.

20 It was noted that Dr. Burke, already
21 employed, and Dr. Lewis, in effect employed,
22 posed real problems.

23 J. C. B, and that is Janet Brown, outside
24 counsel.

1 And I believe there are counters.

2 THE COURT: Let's go ahead and read the
3 counters, and then we will take the afternoon
4 break. Hopefully they are not too long.

5 MS. MIDDELHOFF: They are brief.

6 THE COURT: They are brief.

7 MS. MIDDELHOFF: (1) history of American
8 Tobacco Company, quote, biological research.

9 Harlan recalls that, when he came to the
10 company's laboratory about thirty years ago,
11 there were animals there. They were removed
12 shortly thereafter to the laboratories of the
13 Medical College of Virginia, MCV, however.

14 Since that time, they agreed, the company
15 has initiated no biological research on animals
16 in its own laboratory. It has sponsored, by
17 grant or other payment, animal work by others,
18 MCV, Woodard, other consulting laboratories.

19 Such work has been sponsored at MCV over
20 a period of thirty years.

21 At MCV, such studies proceeded under the
22 direction of Haag and Larson, who were
23 consultants to the company. American Tobacco
24 Company employees frequently worked with them.

1 In response to claims of pathological
2 effects of smoking, the company has supported
3 biological investigation, where indicated, by
4 grants to independent investigators within
5 whose special competence such research and its
6 evaluation lies.

7 It has, in sum, kept fully informed
8 respecting all such charges and made large
9 grants to independents having facilities and
10 competence adequate to their investigation.

11 THE COURT: All right. We still have, I
12 believe, one more in this packet, and we will do
13 that after the break.

14 By the way, we are quitting today at four.

15 (A recess is taken.)

16 (In open court with a jury present.)

17 THE COURT: All right. Be seated, please.

18 MS. McHENRY: The final document in this packet
19 Your Honor is 10383. May I approach, please?

20 THE COURT: All right, uh-huh.

21 MS. McHENRY: This is the American Tobacco
22 Company, it's dated July 1, 1970, the authors are
23 Robert Walker, chairman and CEO of American Tobacco
24 Company, and Robert Heimann, president of American

1 Tobacco Company.

2 It's a memorandum to research and development
3 director.

4 This directive is for your guidance in
5 operating the Department of Research and
6 Development and supercedes previous directives.

7 Research. The department's research
8 activities are to be concentrated on the
9 improvement of our products as to taste,
10 mildness, burning qualities, and other related
11 characteristics, and on the development of
12 knowledge as to the chemical and physical
13 properties of smoke.

14 The department should be the repository
15 of the company's knowledge and skill in the
16 fields of blending, flavoring, moisture
17 retention, filtration, package protection, and
18 related aspects.

19 The department's work should be organized
20 so that information and experience from all
21 possible sources, including analyses of
22 competitive products and the use of objective
23 taste tests, shall be brought to bear on the
24 improvement of quality in our products and in

1 the development of new products.

2 Biological and medical experimentation is
3 outside the scope of the research department.
4 No employee of the department is authorized to
5 make any statement in this area without the
6 written approval of the chairman or president.
7 No research project in this field may be
8 undertaken, nor may any grant for this purpose
9 be made, without the written approval of the
10 chairman or president.

11 We are not qualified to perform
12 fundamental research in this field, and funds
13 are made available for this purpose to the
14 Council for Tobacco Research U.S.A. and other
15 independent researchers.

16 And it is signed Robert B. Walker, chair
17 and chief executive officer, and Robert K.
18 Heimann, president.

19 There are no counters, Your Honor
20 THE COURT: All right.

21 MR. BAKER: Good afternoon, Your Honor. The
22 next group of documents we would like to move into
23 evidence is Group O, and those documents are 37660,
24 20995, 36406, 41541, and 21292.

1 THE COURT: All right. Any objection beyond
2 what has already been discussed?

3 MR. KLEIN: No, Your Honor.

4 THE COURT: All right. Those exhibits will all
5 be admitted into evidence and made a part of the
6 record in this proceeding, and they may be published
7 to the jury at the convenience of counsel.

8 (The exhibit is so admitted.)

9 MR. BAKER: Your Honor, the first document we
10 would like to publish is 37660. May I approach?

11 THE COURT: Sure.

12 MR. BAKER: This document is authored by
13 Dr. Blackman, who was at BATCO. He's a senior
14 scientist and director of research and development.
15 There is a name stated within. It's a group. GRDC,
16 is the group, Research and Development Center.
17 Visit by Dr. LCF Blaxman to B&W Louisville, 3rd
18 through the 7th of October, 1983. Technical notes.
19 Present, Mr. E.E. Kohnhorst is it, Mr. L. Reynolds,
20 Mr. G. Esterle, and Mr. Rhiel.

21 Project Rio.

22 B&W are keen to participate in the
23 program conceived at the BCAC and further
24 developed at the research conference. They

1 recognize, however, severe legal implications
2 regarding product liability which have yet to
3 be resolved by the lawyers. Until guidelines
4 are issued, any contact between GR&DC and B&W
5 should be by telephone. Two possibilities
6 being considered are:

7 (1) do not assess the biological activity
8 of commercial U.S. products but use
9 representative blends;

10 (2) use the commercial products but keep
11 all results in Southampton.

12 Summary of B&W research.

13 From what was an unusually open
14 description of B&W current work, I detected no
15 areas of overlap or redundancy with the GR&DC
16 longer-term research program. It was made
17 clear that B&W policy is to rely on GR&DC for
18 such work.

19 I believe there are counters, Your Honor.

20 MS. MIDDELHOFF: There are not.

21 MR. BAKER: There are not, okay.

22 THE COURT: All right.

23 MR. BAKER: Your Honor, the next document that
24 we would like to publish is 20995. May I approach?

1 THE COURT: Sure.

2 MR. BAKER: The author of this document is A.L.
3 Herd. He's a senior BATCO scientist. Research and
4 development. Meeting of the heads of the CAC
5 tobacco companies. London, 7 and 8 March 1985.

6 Present: Mr. E. A. A. Bruell, Mr. R.J.
7 Pritchard, Mr. M. E. Kraushaw, Mr. J. L. Mercier,
8 Herrn. D. Von Specht, Mr. T. E. Sandefur, Mr. P.B.
9 Smith, Mr. D.K. Thorpe, Mr. A. L. Heard.

10 Biological research.

11 To be terminated at GR&DC except for a
12 two-man team for Ames testing. Project Rio to
13 be completed, based on Ames tests, and each
14 territory to then decide what action to take on
15 brands.

16 Under ALH, a small senior team of
17 scientists will determine the future use of
18 external agencies for research in the
19 biological/S&H area.

20 It was agreed that work on smoke
21 retention should be terminated within the
22 group.

23 You can see, it's by A.L. Herd, 11th March
24 1985.

1 Counters?

2 MS. MIDDELHOFF: Plans for GR&DC.

3 It is proposed that GR&DC ceases to be a
4 central research establishment and becomes the
5 laboratory for BAT U.K. E and BATCO in an
6 arrangement paralleling that which exists for
7 the laboratories in the CAC companies. It will
8 cease to be an extension of head office.

9 It is recognized that since the
10 establishment of GR&DC as the BAT tobacco
11 research laboratory thirty years ago, the
12 various CAC laboratories have developed
13 expertise in certain research areas, and it is
14 now natural to build on these skills.

15 In future fundamental research will be
16 done across the group by the laboratory showing
17 the greatest interest/expertise for any
18 particular subject.

19 (2) smoke research.

20 This is an important area of fundamental
21 research and, in view of the high caliber of
22 the team, is best left in Southampton.

23 Within the combustion/mechanisms
24 projects, particular interest was shown in work

1 aimed at reducing/eliminating the formation of
2 known undesirable smoke components.

3 U.S.A. expressed considerable interest in
4 expanding their activity in various aspects of
5 smoke formation, including aerosol formation.

6 This will be coordinated with the
7 Southhampton work.

8 B.A.T. Industries have charged BATCO to
9 ensure that, as a result of this restructuring
10 of R&D, the outcome is greater achievement
11 rather than necessarily lower cost.

12 MR. BAKER: The next document, Your Honor, is
13 36406. May I approach?

14 THE COURT: All right.

15 MR. BAKER: This is a document from BATCO, the
16 sister company of B&W.

17 Biological research, animal work, work on
18 animal tissues.

19 1986. All animal work to be terminated
20 ASAP. Finish current work on animal tissues,
21 including tissues from animals just killed, and
22 report within three months. Stop current work
23 within two months. Report progress.

24 There are no counters, Your Honor.

1 THE COURT: All right.

2 MR. BAKER: The next document, Your Honor, is
3 41541. May I approach?

4 THE COURT: All right.

5 MR. BAKER: The author of this document is Ann
6 Johnson, she's a senior BATCO solicitor and
7 attorney. One name stated within is Ray Pritchard.
8 He was B&W CEO.

9 1986. Note to EAA Bruell, Esquire,
10 litigation against BAT companies. Research.

11 We had a meeting yesterday with Ray
12 Pritchard to discuss the above and since then I
13 have had a brief meeting with Ernie Pepples.

14 In the light of this, B&W's position is
15 that:

16 (2) decisions to undertake research
17 should be managerial decisions, not scientific
18 decisions.

19 (3) research into product modification;
20 e.g., biological activity, CO, et cetera, should
21 not be done because.

22 (B) discovery of such research could
23 prejudice B&W's chances of defending
24 litigation.

1 (5) information/document distribution
2 should be kept to a minimum to avoid documents
3 becoming available to plaintiff in litigation.
4 Information should be available on a, quote,
5 retrieval, end quote, rather than a, quote,
6 disperse, end quote, cases.

7 (B) commercial product modification,
8 research and implementation. BATCO and other
9 parts of the group see possible commercial need
10 for this work; whereas, B&W does not.

11 You can see it's signed Ann Johnson, and NB
12 Cannar.

13 MS. MIDDLEHOFF: Historically GR&DC acted as a
14 center for the group's research activities and
15 reports, and databases are and have been made freely
16 available throughout the group.

17 Following the 1985 reorganization, the
18 research effort has been decentralized, and
19 BATCO is now responsible for coordinating the
20 overall research effort throughout the group
21 and ensuring that companies have access to
22 research information.

23 This involves the collection by BATCO of
24 details of all research projects and results

1 and the dissemination of that information.
2 (C) the flow of information, which will
3 inevitably be in document form, between CAC
4 companies is an integral part of a coordinated
5 decentralized research system.

6 MR. BAKER: The final document of this
7 grouping, Your Honor, is 21292. May I approach?
8 This document is authored by Nick Cannar, N.D.
9 Cannar, and he's the head solicitor and attorney at
10 BATCO, or was, excuse me.

11 Secret, draft, March 24, 1986. Note for
12 the tobacco strategy review team. Tobacco
13 research in the B.A.T. Industries group.

14 Brown & Williamson now believe that, for
15 legal reasons, parts of the group research
16 program are not acceptable.

17 Brown & Williamson's position.

18 (1) product research.

19 (B) product modification work where there
20 is no current identified consumer demand or
21 regulatory requirement is not desirable; i.e.,
22 there should be no anticipation of future
23 trends in these areas

24 Smoking and health.

1 Brown & Williamson are opposed to any
2 research which has any relevance to the smoking
3 and health issue other than providing financial
4 support, if this is thought necessary to
5 broadly based external research programs; e.g.,
6 genetic mechanisms of disease.

7 (3) reasons.

8 (B) any certain which is smoking and
9 health related other than funding of broadly
10 based external programs could lead to
11 discoveries which might be damaging in court
12 and could require immediate product
13 modification even if commercially unacceptable.
14 Comment on Brown & Williamson's position.

15 From a B&W perspective, anything which
16 might potentially add to the burden of
17 defending U.S. litigation should be avoided if
18 possible. Four points strike me about their
19 stance.

20 Point two. Brown & Williamson's position
21 is that it should be isolated from any research
22 work which might be regarded in a U.S. context
23 as at all contentious.

24 Furthermore, if it ever came out in a

1 U.S. court case that Brown & Williamson had
2 deliberately pursued a policy of, quote,
3 burying its head in the sand, end quote, and
4 cutting itself off from work done elsewhere in
5 the BAT group, one can only believe that this
6 would be enormously damaging.

7 Any counters?

8 MS. MIDDELHOFF: Yes.

9 As part of its role of coordinating
10 research among the CAC companies, BATCO has
11 taken the following steps.

12 (1) it has developed a group research
13 program comprising 153 projects taken from
14 individual research programs of CAC companies
15 which are perceived as being of group
16 interest. It is proposed to maintain a
17 computer base of information about these
18 projects which can be accessed by members of
19 the group.

20 (2) at the group conference at Rio in
21 November last year, BATCO agreed with all the
22 other CAC companies, including B&W, a rationale
23 for research.

24 (B) smoking and health research. The

1 investigation of the effects of smoking on the
2 smoker is not market driven but for various
3 reasons is seen as a responsible area of
4 activity for a major cigarette company.

5 The sentence that Mr. Baker read followed by:

6 On the other hand, BATCO believe that the
7 program reflects a responsible commercial
8 attitude which takes due account of legal
9 obligations. B.A.T. Industries has been asked
10 for a ruling.

11 MR. BAKER: Your Honor, the next group of
12 documents we would like to move into evidence is
13 Group S.

14 THE COURT: All right.

15 MR. BAKER: There are five documents within
16 that group. The first document is No. 15548, the
17 next is 1061, 27506, 18831, and finally 363.

18 THE COURT: All right. Any objection beyond
19 those that have already been discussed.

20 MR. KLEIN: No, Your Honor.

21 THE COURT: All right. Those exhibits will be
22 admitted into evidence and made a part of the record
23 in this proceeding, may be published to the jury at
24 the convenience of counsel

1 (The exhibit is so admitted.)

2 MR. BAKER: The first document Your Honor is
3 15548. May I approach?

4 THE COURT: Yes, sure.

5 MR. BAKER: The author of this document is M.E.
6 Johnston, a senior scientist at Philip Morris.
7 Special Report No. 248, market potential of a health
8 cigarette, confidential.

9 June 1966, market potential of a health
10 cigarette. Written by M.E. Johnston, approved
11 by W.L. Dunn, Jr., distribution, Dr. H. Wakeham
12 and Dr. R. B. Seligman.

13 (II) recommendations. Our posture with
14 regard to a health cigarette entry should be
15 determined by anticipated political and market
16 conditions.

17 All indications are that 1966 elections
18 will result in a Congress more sympathetic to
19 business and less inclined than the present
20 Congress to pass restrictive legislation.

21 My recommendation is that we not
22 introduce a new health cigarette unless there
23 is another health scare or additional
24 restrictive legislation is passed.

1 MR. KLEIN: A large proportion of smokers are
2 concerned about the relationship of cigarette
3 smoking to health.

4 Available evidence from surveys shows
5 conclusively that smokers are concerned about
6 the relationship of cigarette smoking to
7 health.

8 In late 1964, a Public Health Service
9 survey showed that, quote, a large majority of
10 the cigarette smokers surveyed indicated they
11 believed smoking to be harmful.

12 At this time, according to the Surgeon
13 General, eighteen million Americans have sworn
14 off cigarettes.

15 MR. BAKER: The next document, Your Honor, is
16 1061. May I approach?

17 THE COURT: All right.

18 MR. BAKER: The author of this document is
19 Dr. S. J. Green, who is a senior scientist at BATCO,
20 which is a B&W sister company, recipient was D.S.F.
21 Hobson of BATCO Corporation. To Mr. D.S.F. Hobson.

22 In appendix one are listed a number of
23 apparently disconnected findings which have
24 appeared over the last year or so. They

1 suggest to us that we are approaching the point
2 where some significant advance in smoking and
3 health may be made.

4 The main purpose in these proposals is to
5 put ourselves in a position from which we can
6 move rapidly as further developments indicate
7 the right direction.

8 And down at the bottom it says SJG, 2nd of
9 March, 1967.

10 13. The Ariel smoking device is
11 smokable, would probably be safer to smoke than
12 an ordinary cigarette and manufacture now
13 appears feasible.

14 MR. BAKER: I believe there are counters, Your
15 Honor.

16 MR. WOODSIDE: A critical appraisal of BAT
17 research and development programs is due now, and no
18 doubt considerable pruning will prove desirable.
19 Before doing this, however, it would be useful to
20 have your reaction to some specific proposals.

21 We propose the following appointments
22 should be made as soon as possible:

23 (A) a scientist skilled in medical
24 science to assist in the direction of bioassay

1 work and the study of the reaction of smoke on
2 smokers.
3 The -- actually I should have read the title at
4 top.

5 Smoking and Health, Some Recent Findings.
6 (1) the Harrogate result that the 24-hour
7 condensate has a greater mouse skin effect than
8 a neutral fraction contained within it shows
9 that the carcinogenic effect of smoke is not
10 simple. It may well be a combination of
11 initiators and promoters, a hypothesis that is
12 well founded on other experimental evidence.

13 (2) the carcinogenic effect of smoke
14 condensate on mouse skin cannot be accounted
15 for by the presence of the benzpyrene known to
16 be there.

17 (4) the spraying of nitrates on tobacco
18 markedly reduces the mouse skin carcinogenic
19 effect.

20 (5) addition of nicotine to known
21 carcinogens or to smoke condensate has no
22 effect on the mouse skin carcinogenic effect.

23 (9) selective filtration of certain smoke
24 components can be carried out. Our

1 understanding of the basic mechanisms involved
2 has been significantly improved.

3 (10) progress is being made in
4 identifying the substances responsible for the
5 irritant effects of smoke.

6 And that completes the counterdesignations,

7 Your Honor.

8 THE COURT: All right.

9 MR. BAKER: The next document, Your Honor, is
10 27506 I would like to publish, if I may?

11 THE COURT: All right.

12 MR. BAKER: This document is authored by I.W.
13 Hughes, it was a BATCO senior scientist. Arial,
14 13th May 1967.

15 In summary, the Ariel design provides (1)
16 a physiologically active aerosol of known
17 qualitative and quantitative composition, and
18 (2) an aerosol of controllable particle size
19 and stability. In other words, a satisfying
20 smoke which, within present knowledge, is,
21 quote, healthy, end quote.

22 The ramifications of these properties are
23 as follows:

24 (A) as an inhaling device.

1 (1) complete avoidance of primary
2 carcinogens.

3 (2) probably avoidance of co-carcinogens.

4 (3) controlled physiological response.

5 Therefore suitable for all segments of
6 smoking population.

7 I don't believe there are any counters.

8 The next document, Your Honor, is 18831. May I
9 approach?

10 THE COURT: All right.

11 MR. BAKER: The author of this document is Max
12 Hausermann, he was a senior scientist at Philip
13 Morris Europe.

14 Philip Morris Europe S.A. interoffice
15 correspondence, note to the file, from
16 M. Hausermann, subject Cytrel.

17 Visit by Mr. L. F. Muskett, date, 1-4-75.

18 Mr. L. F. Muskett of Amcel visited PME in
19 the afternoon of March 20, 1975. Messrs.
20 Gaisch, Hansen, Hausermann and Stolt, part-
21 time, were present from PME.

22 We told Mr. Muskett about the cigarette
23 samples we had prepared with 20 percent Cytrel
24 in the filler blend. No samples were shown or

1 handed over to him.

2 Two samples had been prepared: One with
3 a Maryland type cigarette, one with a blend
4 type cigarette. The tar and nicotine
5 reductions were as expected, but in the case of
6 the blend type cigarette, the tar reduction on
7 a per puff basis was not lowered by the 20
8 percent tobacco substitution by Cytrel. The
9 subjective response was from favorable,
10 parentheses, Maryland type cigarette, end
11 parentheses, to still acceptable, blend type
12 cigarette.

13 We did not insist further on the
14 technicalities of the use of Cytrel. We said
15 we had problems on the marketing sector because
16 we could not find good arguments in favor of
17 nontobacco smoking products to be given to the
18 public without simultaneously damaging the good
19 image of tobacco.

20 The signature is Max Hausermann, and
21 distribution includes Dr. H. Gaisch and Dr. Helmut
22 Wakeham.

23 There are no counters to that, Your Honor.

24 The final document, Your Honor, is 363, may I

1 approach?

2 THE COURT: Yes.

3 MR. BAKER: The author of this document is Earl
4 Kohnhorst, who was a B&W executive vice president
5 and chief operating officer, the recipient is J. A.
6 B. Kellagher, BATCO marketing department.

7 The letterhead of B&W, Brown & Williamson
8 Tobacco Corporation, April 26, 1985.

9 Mr. J. A. B. Kellaghe, British American Tobacco
10 Company Limited.

11 Dear Alan:

12 Re: Your letter to Tom Whitehair, February 19,
13 1985.

14 In the U.S, the activity on CO delivery
15 within the industry appears to be on a low
16 key. Right now, we do not see any pressures
17 coming from either government agencies or
18 consumer groups. This, however, does not
19 preclude such pressures building up in the
20 future.

21 Within B&W, we have rarely attempted to
22 develop new products specifically designed to
23 deliver low CO, except perhaps a prototype of
24 Fact that was kept ready on a turnkey basis in

1 the event of a marketing need for such product.

2 Needless to say, such need did not arise.

3 Kind regards, E. E. Kohnhorst.

4 There are counters, Your Honor.

5 MR. WOODSIDE: Just one, Your Honor, I can read
6 it from here.

7 THE COURT: All right.

8 MR. WOODSIDE: This is the sentence Mr. Baker
9 did not read from that one paragraph.

10 This was done through a combination of
11 filter ventilation, cigarette paper
12 permeability, and appropriate cigarette paper
13 additive.

14 That completes the counterdesignation.

15 THE COURT: All right. Now, I do understand
16 that the remaining documents are co-joined with some
17 depositions. It's going to take us longer than 4:00
18 to go over those.

19 MR. SEGAL: That will be correct, Your Honor.

20 THE COURT: So in order to keep our promise so
21 that we can make sure that everybody gets to their
22 class on time, we will adjourn for the evening. Is
23 that the understanding?

24 MR. SEGAL: Yes, Your Honor.

1 THE COURT: Now, just try to contain your -- it
2 won't happen all the time.

3 All right. Fine. Let's -- as you know, we
4 are -- we will not be here tomorrow. We will take
5 up again Monday morning at 8:30.

6 Please do not discuss the case among yourselves
7 nor permit anybody to discuss it with you, don't
8 read about it, don't do anything at all. Don't
9 think about it. Just think about many other things,
10 as I'm sure that you can and will do.

11 See you back here at Monday morning at 8:30.
12 Thank you.

13 (The jury leaves the courtroom.)

14 MR. SEGAL: Your Honor, can we meet Monday at
15 8:00? You said give you a heads-up. There are a
16 couple of things that need to be discussed.

17 THE COURT: Okay. Do you want to give me a
18 heads-heads-up so I know what we will be talking
19 about?

20 MR. SEGAL: I know David wants to talk about a
21 curative.

22 MR. RODES: And the check required issue.

23 THE COURT: And the -- you want to go over the
24 NM 75228.093 and 094?

1 MR. RODES: Yeah, that thing, right.

2 THE COURT: And if you want to talk about a
3 curative instruction on the matters we talked about
4 today, you know, you have got some time to work on
5 it, but be sure that I have it, though, in advance.

6 MR. RODES: Yes.

7 THE COURT: So we will be able to talk about
8 it. We don't have to do it on Monday, but if you
9 want to, I will be here.

10 MS. FORBES: Your Honor, Mr. Baker and I would
11 like to take care of LeBow today, if you have three
12 more minutes?

13 MR. BAKER: We have five lines.

14 THE COURT: Sure, come on up.

15 We don't need to put this on the record.

16 (Discussion held off the record.)

17 (Thereupon, the hearing adjourns at 3:25 p.m.)

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